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No. 96-857

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In The

Supreme Court of the United States

October Term, 1996

FRANCES BERNARD AUER, *et al.*,

Petitioners,

vs.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Does the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) ("FLSA") salary basis test in 29 CFR § 541.1 and 2, as interpreted by the Secretary of Labor, apply to public agency employees?

2. Do the Secretary of Labor's interpretations of the salary basis test in 29 CFR § 541.118(a) and, more particularly § 541.118(a)(5), require the loss of salaried status when an employee is merely subject to the possibility of a disciplinary suspension of less than a week for non-safety related conduct, and should those interpretations apply to employees of a public agency engaged in law enforcement activities?

3. Should the Secretary of Labor's interpretation of the effect of an impermissible deduction from salary, 29 CFR § 541.118(a)(6), be given a meaning other than that which is plainly stated and are Respondents entitled to restore Sergeant Michael Guzy's salaried, exempt status by reimbursing him for a two (2) day suspension and committing to continue existing practice on disciplinary suspensions, if his suspension constituted an impermissible deduction from his salary?

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CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED

Amendment XI to the Constitution of the United States:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

29 U.S.C. § 202

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. ***The Congress further finds that the employment of persons in domestic service in households affects commerce.***

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its

> power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

All other pertinent statutory provisions and regulations are contained in the Appendix to Petition for Writ of Certiorari and/or the Joint Appendix.

SUMMARY OF THE ARGUMENT

Initially, in deciding whether or not the FLSA salary basis test for the executive and administrative exemptions, as interpreted by the Secretary of Labor, has application to public agency employees, the Court must first consider whether federal jurisdiction exists to hear the case. Because the Board of Police Commissioners, of which Respondents were members, is by Petitioners' own description, an agency of the State of Missouri and all operations of the St. Louis Metropolitan Police Department are governed by state law, the case at bar is a suit commenced by Petitioners against a state. Jurisdiction of the federal courts was invoked under the provisions of the FLSA which was enacted pursuant to the Interstate Commerce Clause. The Eleventh Amendment bars private parties from bringing an action in federal court against a state to enforce such an Act of Congress. Therefore, regardless of the propriety of the FLSA salary basis test, this action must be dismissed for lack of jurisdiction.

Notwithstanding the jurisdictional issue, that part of the salary basis test, as interpreted by the Secretary of

Labor in 29 CFR § 541.118(a)(5), which would limit Respondents' ability to discipline otherwise exempt employees by prohibiting suspensions of less than a week under certain circumstances, at the risk of loss of salaried status, is invalid in its application. Public employers, and more specifically law enforcement agencies, are treated differently than private employers under the FLSA in numerous respects including the overtime standards. More recently, the Secretary of Labor amended the regulations to allow public employers to make deductions from employees' salaries for absences of less than a day without affecting their salaried, exempt status. This exception, which is not available to private employers, was based on the recognition of principles of public accountability. There is no rational basis for allowing deductions for a salaried employee's absences of less than a day while disallowing disciplinary suspensions of less than a full week, except for major safety rules violations.

Furthermore, the rationale for 29 CFR § 541.118(a)(5) did not take into account the importance of discipline from a public accountability standpoint in a law enforcement agency or the fact that such an agency's mission is preserving the public safety. Private employers can legitimately impose disciplinary deductions on salaried, exempt employees for violations of safety rules of major significance. A public employer whose entire function is safety related must be allowed greater flexibility than a private employer in maintaining discipline within its organization. Thus, Respondents urge the Court to find the application of 29 CFR § 541.118(a)(5) invalid in this case or to interpret it in such a way that permits Respondents to suspend exempt officers for periods of less than

a week for legitimate disciplinary reasons without jeopardizing their status as salaried employees. Rigid and arbitrary application of salary test interpretations which were never designed to apply to public law enforcement agencies cannot be and has not been justified by the Secretary of Labor or Petitioners.

Assuming *arguendo* that the Secretary of Labor's interpretations are entirely valid and applicable to Respondents, the determination that Petitioners were paid on a salary basis, based on the facts of this case, was the correct determination and should be affirmed. Attempts by Petitioners to reargue the facts are inappropriate. The record contains no evidence that a single one of the two hundred eighty-nine (289) Petitioners have actually suffered a deduction from salary due to variations in quality or quantity of work. The evidence reveals only one Petitioner was suspended for less than a full week as a disciplinary measure and that occurred only with the Petitioner's agreement as an alternative to the loss of his job, and cannot reoccur due to a change in the Disciplinary Code. Thus, there is no evidence of a practice of making improper deductions for the period from 1979 when all Sergeants and higher ranking officers were converted to the salary basis of payment by mandate of state law.

The Secretary of Labor in the Amicus Brief filed at the invitation of this Court clarified the DOL interpretation of 29 CFR § 541.118(a)(5). In so doing, the Secretary specifically concluded that the Eighth Circuit opinion correctly concluded that Petitioners, as a class, were not subject to reductions in pay for disciplinary suspensions of less than one week for violations of non-safety related

rules. The Secretary further suggested that in the circumstances of this case, one would have to ignore the realities of Respondents' compensation scheme to characterize Petitioners as hourly-paid, rather than salaried, employees.

Prior to the filing of the Amicus Brief of the United States, it was represented in the Petition for Writ of Certiorari that the Secretary of Labor's construction and interpretation of his own rules on the subject of disciplinary suspensions and their effect on the salaried status of an employee or group of employees, were not only due deference but were controlling in this case. At that time Petitioners believed the Secretary's views to be at odds with the Eighth Circuit's interpretations of 29 CFR § 541.118(a)(5) and (6). However, having received the benefit of what the Secretary termed a "clear statement" on the "correct reading" of DOL regulations which is at odds with the positions asserted by Petitioners, they have apparently changed their minds and decided that the Secretary's views should be controlling only when he shares their views.

Respondents submit that because Petitioners committed to a legal proposition in their Petition, they cannot abandon that proposition and make any credible argument to the contrary in their Brief. Petitioners, by their own statement of the law, are bound by the Secretary of Labor's expressions of the proper application of the salary basis test and his interpretations thereof, on the facts of this case. Both the Secretary and the Eighth Circuit

agree that the mere potential for a disciplinary suspension which is inconsistent with the Secretary's interpretations of the salary test will not defeat an employee's salaried status.

Not only has the Secretary concurred that two hundred eighty-eight (288) of the two hundred eighty-nine (289) Petitioners were not subject to improper disciplinary deductions, he has expressly endorsed the Eighth Circuit's fact bound holding that Respondents were and are entitled to correct the effects of the two (2) day suspension accepted by one Sergeant and preserve his salaried status. Clearly, that "deduction" was an isolated incident and not reflective of a policy or practice of improper deductions. It is equally clear that it was not made because of a lack of work and, therefore, fit squarely within the criteria of 29 CFR § 541.118(a)(6). Obviously, Respondents do not agree that the disciplinary deduction component of the interpretations of the salary basis test is or should be applicable to their exempt officers. Nor do Respondents agree that the one suspension in evidence should be interpreted as inconsistent with the salary basis of payment, particularly as applied to a law enforcement agency. Nonetheless, if this Court rules to the contrary, Respondent will reimburse the Sergeant in question for two (2) days of his bi-weekly salary and continue its existing practice by which exempt officers are not subject to disciplinary suspensions of less than a week for violations of rules which are not directly related to the safety of the general public or their fellow officers.

Petitioners are not entitled to obtain overtime compensation back to 1986 on the basis they are not salaried

employees because of one brief suspension in 1990 bargained for by the Sergeant in question, which, since 1991, could not be repeated. The mere existence of a disciplinary policy containing a range of penalties which include suspensions of less than a full week did not convert every Sergeant and Lieutenant, who are by state law salaried employees, to hourly paid employees. There must be evidence that it was the practice of Respondents to subject Petitioners to improper disciplinary suspensions, under the Secretary's interpretations, to support a legal conclusion that Petitioners are not paid on a salary basis. The record is devoid of any such evidence. To conclude otherwise would result in a legal absurdity which, in turn, would result in a windfall for Petitioners and an overwhelming and unforeseen financial liability for Respondents.

ARGUMENT

I. THE SALARY BASIS TEST CANNOT BE APPLIED BECAUSE RESPONDENTS ARE IMMUNE FROM SUIT BY PETITIONERS UNDER THE FAIR LABOR STANDARDS ACT.

The broad question presented for review in the Petition for Writ of Certiorari is whether or not the salary basis test in 29 CFR § 541.1 and 541.2 for exemption from the minimum wage and overtime requirements of the Fair Labor Standards Act (29 U.S.C. § 213(a)(1)) ("FLSA") is applicable to public employees. Without explanation, Petitioners omitted this question from their Brief and

failed to present any argument in support of an affirmative resolution of the question. Respondents submit that strict application of the salary test to the otherwise exempt executive and administrative commissioned officers of the St. Louis Metropolitan Police Department is invalid on two (2) separate grounds. First, the salary test cannot be applied at all because the facts of this case show that the Board of Police Commissioners on which Respondents served is a creation of Missouri state statute which grants to the Governor the power to appoint the members of the Board. The establishment and operation of the St. Louis Metropolitan Police Department ("Department"), including the manner in which police officers are compensated, is governed by state law. Sections 84.030-100 and Section 84.160, R.S.Mo. (Jt. App. 17-19).

Missouri law specifically prohibits the payment of any additional compensation over and above the bi-weekly salaries authorized, or compensatory time off, for overtime to any officer of the rank of Sergeant or above (Jt. App. 18; Pet. App. 6a, 43a-44a). The trial court specifically noted in its Findings and Conclusions of Law, it was assumed that "Missouri's elected representatives took care and gave great contemplation when designing a St. Louis Police Department organizational structure that would best serve a particular constituency." (Pet. App. 44a). Finally, the trial court rejected "Plaintiffs' contentions that Mo. Rev. Stat. § 84.160 and specifically Mo. Rev. Stat. 84.160(5) should be preempted by the FLSA." (Pet. App. 62a). Clearly, it was contemplated from the outset that this was a suit against the state appointed Board members to require them to discontinue their adherence

to state law and, instead, comply with Petitioners' view of the federal law as expressed in the FLSA and its implementing regulations.

That being the case, this action is, for all intents and purposes, a suit against the State of Missouri within the meaning of the Eleventh Amendment to the United States Constitution.[1] This Court held in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), that the Eleventh Amendment bars Congress from authorizing private parties to bring suit in federal court against a state to enforce federal laws enacted pursuant to the Interstate Commerce Clause. The Fair Labor Standards Act was specifically enacted through the exercise of Congress' power to regulate commerce among the several states. 29 U.S.C. § 202(a) and (b). Therefore, the FLSA salary basis test could not be applied to Petitioners because the trial court lacked jurisdiction to hear their claims for overtime compensation under the FLSA.[2]

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[1] *See* Second Amended Complaint for Declaratory Judgment, Overtime Pay, Liquidated Damages and Other Relief Under the Fair Labor Standards Act in the Appendix to Respondents' Brief, pages 1-8. In Paragraph 13 thereof, Plaintiffs-Petitioners identify the Board of Police Commissioners as the "governing state agency authority for the St. Louis Police Department." In Paragraph 19, Plaintiffs-Petitioners allege that the state law prohibiting payment of overtime compensation to Sergeants and higher ranking officers is unconstitutional.

[2] Respondents specifically raised a constitutional issue in a Motion to Dismiss for Lack of Jurisdiction made during the trial (Jt. App. 94-95). Even if this jurisdictional issue is not considered to be "fairly included" within the first question presented for review in the Petition for Writ of Certiorari, this

Several federal district courts have recently concluded, based on the *Seminole Tribe* decision, that Congress did not have the authority under the FLSA to abrogate a state's Eleventh Amendment immunity and have dismissed lawsuits brought by employees against a state for lack of jurisdiction. *Adams v. State of Kansas*, 919 F.Supp. 1496 (D. Kan. 1996); *Mills v. State of Maine*, ___ F.Supp. ___, 3 WH Cases 2nd 767 (D. Maine 1996); *Close v. State of New York*, 1996 U.S.Dist. LEXIS 12330 (N.D. N.Y. 1996). *See also MacPherson v. University of Montevallo*, 1996 U.S.Dist. LEXIS 13357 (N.D. Ala. 1996). The same result must follow in this case. Consideration of the proper interpretation and application of the salary basis test to Petitioners is, therefore, unnecessary to the resolution of this case.

II. THE DISCIPLINARY DEDUCTION COMPONENT OF THE SECRETARY OF LABOR'S SALARY BASIS TEST IS IRRATIONAL, ARBITRARY AND CAPRICIOUS AS APPLIED TO A PUBLIC EMPLOYER ENGAGED IN LAW ENFORCEMENT ACTIVITY.

If Petitioners' FLSA claims are not dismissed, Respondents urge the Court to rule that possible or actual disciplinary suspensions of any of the Petitioners by the Department for periods of less than a week should not jeopardize their salaried status, regardless of the reason for the suspension. The St. Louis Metropolitan Police Department is a law enforcement agency which operates as a quasi-military organization. The trial court found it is structured in a way to enable police officers to respond

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Court is obligated to address it. *Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 114 S.Ct. 425 (1993).

effectively and rapidly to emergencies, to move quickly and decisively where force is required, and to generally set a tone of discipline and good order among the ranks (Pet. App. 41a). In the Police Manual, it is stated that the primary responsibility of the Department and each of its members is to protect the lives of the citizens they are sworn to serve (Pet. App. 105a).

Members of the Department are held to a higher standard of conduct than members of the general public. *See* Section 7.004, Standards of Conduct (Pet. App. 107a-113a). The Department cannot carry out its mission of insuring the safety of the general public in a manner which respects the rights of all persons without insuring that its officers conform to its high standards of conduct. To accomplish that, the Department must maintain discipline and the ability to do so is significantly infringed if it is effectively limited to non-salaried officers. Nor does it make sense that exempt officers in executive and administrative positions who receive a predetermined amount of compensation each pay period regardless of how many hours they work, can only be suspended as a disciplinary measure in increments of a full week.

The Eighth Circuit in *McDonnell v. City of Omaha*, 999 F.2d 293 (8th Cir. 1993), took note of the fact that there is a difference between private and public sector employees. Congress recognized, even before this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that public agencies and particularly those engaged in law enforcement activities, warrant different treatment under the FLSA from private employers. One of the most significant differences is that law enforcement agencies do not have to pay overtime compensation for hours worked in excess of forty (40) in a

week. The forty (40) hour work week requirement has been the standard for private employers for more than twenty-five (25) years but recognizing basic differences in law enforcement operations, the FLSA was amended to allow public agencies operating police departments to measure overtime on work periods ranging from seven (7) to twenty-eight (28) days, rather than work weeks, based on a higher range of hours worked. 29 U.S.C. § 207(k); 29 CFR § 553.230.

Law enforcement personnel are allowed to accrue up to twice as much compensatory time than other public employees. 29 U.S.C. § 207(o)(3)(A).[3] All public employees are allowed to trade shifts with other employees, at their option, and the time worked is excluded from the calculation of hours worked for overtime purposes. 29 U.S.C. § 207(p)(3). All public employees can volunteer to do other work for a public agency. 29 U.S.C. § 203(e)(4)(A). These options are not available to private employers. Finally, as Petitioners point out, in 1992 the Secretary of Labor revised his interpretation of the salary test for public employees to allow them to have their pay docked for partial day absences, under certain circumstances, without losing their status as salaried employees (Pet. Br. 30). However, 29 CFR § 541.118(a)(5) was not open for comment as a part of that rulemaking procedure and the Secretary of Labor has yet to formally consider changes to it for public employees, despite his continuing recognition of the need

[3] Employees in the private sector cannot receive compensatory time off in lieu of cash payment for overtime worked.

to do so (Pet. App. 210a; Jt. App. 43-45). The different requirements and functions of a law enforcement agency necessitate different treatment.

In 29 CFR § 541.118(a)(5), the Secretary has interpreted the salary basis test to permit private employers to penalize, *i.e.*, discipline, otherwise exempt employees for infractions of safety rules of major significance. Such safety rules are interpreted as those relating to the prevention of serious danger to the employer's plant, or to other employees. Thus, there is an explicit recognition that disciplinary suspensions for periods of less than a week where significant safety issues are involved, are not inconsistent with the salary basis of payment. Given the importance of, and special treatment granted in, matters of safety, it requires no great leap in logic to conclude that a police department, whose entire function consists of providing for the public safety, should have greater flexibility than a private employer in disciplining functionally exempt employees. Because of the very nature of their work, the Board must insure that members of the St. Louis Metropolitan Police Department have the trust and confidence of the citizens they serve. The ability to effectively maintain discipline within the Department is clearly essential to earning the public's trust.

Having already determined that public employers can make salary deductions for partial day absences based on principles of public accountability, it makes no sense for the Secretary or this Court to prohibit law enforcement agencies from using partial week suspensions of exempt officers as a means of discipline and, in turn, public accountability. 29 CFR § 541.5d. Maintaining such a distinction is irrational, arbitrary and capricious.

Forcing Respondents to suspend exempt officers for a full week to avoid jeopardizing their salaried status, regardless of the severity of the misconduct or rules violation, makes no sense for either the officer involved or the Department.

Federal agencies such as headed by the Secretary of Labor are prohibited from interpreting and applying regulations to states which interfere with decisions typically left to local governing officials unless failure to do so would defeat the purposes of the statute being administered. *Bowen v. American Hospital Association*, 476 U.S. 610, 643-644 (1986). Congress never intended that the Secretary of Labor regulate the internal operations of state and local law enforcement agencies under the guise of the salary test for FLSA exemption. Neither eliminating the application of 29 CFR § 541.118(a)(5) to public employers like Respondents or interpreting it in such a way that permits disciplinary suspensions in increments of a day rather than a week, will undermine the salary basis test or Congressional intent that exemptions from the FLSA be narrowly construed. Significant differences exist between a private, for profit, company and a publicly funded law enforcement agency whose mission is to protect the public safety. Those differences have been recognized in 29 CFR Part 553 as noted herein. Therefore, rigid adherence to interpretations of the salary basis test designed strictly for private employers can no longer be justified.[4]

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[4] Respondents urge this Court to consider the various Amicus Briefs which have extensively and persuasively addressed these issues in Support of Respondents' position.

Respondents submit that the salary basis test cannot rationally be applied or interpreted in such a way that possible or actual disciplinary suspensions, alone, converted Petitioners to non-exempt employees.

III. THERE ARE NO FACTUAL ISSUES BEFORE THE COURT INVOLVING THE SALARY BASIS TEST.

In this case, Respondents asserted as affirmative defenses to Petitioners' claims for overtime compensation that they were exempt executive or administrative employees as such terms are defined and delimited by regulations of the Secretary of Labor. 29 U.S.C. § 213(a)(1); 29 CFR § 541.1 and 2. Because it was stipulated that all Petitioners were compensated in amounts of Two Hundred Fifty Dollars ($250.00) or more for each week they were employed at the rank of Sergeant or above, both the trial and appellate courts analyzed the exemption claims using the "short tests" in 29 CFR § 541.1(f) and 541.2(e)(2) (Pet. App. 10a-11a, 50a).

With respect to Petitioners for whom the executive exemption was claimed, all were ultimately found to have management of a customarily recognized department or subdivision of the St. Louis Metropolitan Police Department as their primary duty and, as a part of their management responsibilities, all customarily and regularly directed the work of two (2) or more other employees. With respect to those Petitioners for whom the administrative exemption was claimed, all were ultimately found to have the performance of office or non-manual work directly related to management policies or general business operations of the Department as their primary duty and that such work required the exercise of

discretion and independent judgment (Pet. App. 14a-35a). The holdings that all Petitioners met the duties tests and were functioning in *bona fide* executive or administrative capacities at all times pertinent hereto are not in dispute.

The only element of the "short tests" for the executive and administrative exemptions which remains in issue is the requirement that the Petitioners be paid "on a salary basis." The substantive dispute before the Court is limited to a single aspect of the salary basis requirement. That is, the effect of the contingent possibility of suspension for a period of less than a work week for an alleged violation of a non-safety related work rule on the salaried status of a functionally exempt executive or administrative employee.[5] While Petitioners raised various other issues in the courts below, such as partial day docking, payment of shift differential and payment of "overtime" pay in various situations, in an effort to show that they were not paid on a salaried basis, none of those issues are before this Court. Respondents are at a loss to understand why such evidence was referenced in Petitioners' Brief or the Appendix.[6] Any factual argument suggesting the existence of other indicia that Petitioners were not salaried must be ignored.

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[5] It is undisputed that an employer need not pay an employee his/her salary in a week in which he/she performs no work. 29 CFR § 541.118(a).

[6] At page 11 of the Joint Appendix, Petitioners have included what purports to be two (2) paragraphs from a Statement of Facts Not in Dispute. The heading is both misleading and inaccurate because it is nothing more than *Plaintiffs'* statement submitted prior to the trial court's summary judgment ruling on the salary test.

The regulations promulgated by the Secretary of Labor for the executive and administrative exemptions contain no requirement as to how such employees must be compensated beyond the basic specification that it be on a salary basis. Regardless of how Petitioners have characterized 29 CFR § 541.118, it is not a regulation. It is merely an interpretation of the regulations. In their Brief, Petitioners never focused on the full wording of the Secretary's interpretation of the term "salary basis" in § 541.118(a). The basic concept is expressed as follows:

> An employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

Respondents assumed the burden to prove that Petitioners were paid on a salary basis as part of their affirmative defenses.

Petitioners seem to suggest to the Court that whether or not Respondents met their burden of proof on this issue at trial, is still open to debate. The record shows otherwise. When summary judgment was granted on October 30, 1991 on the claims of Lieutenant Manuel Delgado, the trial court specifically found that "his pay scheme falls squarely within the 29 CFR § 541.118(a) definition of salaried, and there is no need to look further" (Pet. App. at 72a, footnote 3). There has never been any representation by any Petitioner that Lieutenants were paid differently than Sergeants. Thus, having ruled

on Delgado's salaried status, the trial court then turned to the Sergeants' claims and found that the only remaining issue preventing entry of summary judgment was that of the primary duty test (Pet. App. 73a-74a).

At the outset of the trial, the court confirmed that his ruling on the "salary basis" issue was the same for Sergeants as it was for Lieutenant Delgado (J.A. 67-68). At the conclusion of Respondents' case in chief, but prior to resting, the undersigned counsel reaffirmed that all Plaintiffs (Petitioners) were bound by the Court's prior ruling on the salary basis test. The Court stated "I don't think there's any question in my mind, that ruling shall remain the same." (J.A. 82-83). Because of the affirmative defenses asserted, Respondents were first to put on their evidence during the trial. Thus, the record is clear the trial court had determined prior to trial that Respondents had met their burden of proof to establish that all Petitioners were paid on a salary basis and that determination remained unchanged at the close of Respondents' evidence at trial. The Court did extend the opportunity to Petitioners to put on evidence to make a record for appeal on the ruling but the ruling never changed.[7]

Petitioners' opportunity to challenge the adequacy of the evidence supporting the trial court's holding on the salary basis test has long since passed. Complaints about

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[7] The trial court's analysis of the Missouri statute which fixes and controls the pay practices of the St. Louis Metropolitan Police Department notes that officers at the rank of Sergeant and above have been salaried since 1979 when the state legislature granted them an eight percent (8%) salary increase to offset the effects of their decision to eliminate payments or compensatory time off for "overtime hours." (Pet. App. 43a-45a).

the alleged failure of Respondents to produce witnesses at trial to testify that no Sergeant or Lieutenant had been "docked" for violating a disciplinary rule could and should have been argued by Petitioners in the trial court or at the Eighth Circuit Court of Appeals. Attempts to reargue the facts in this Court are inappropriate and improper. The only evidentiary issue even implicated by the questions presented in the Petition for Writ of Certiorari is Respondents' practice with respect to disciplinary suspensions of executive and administrative employees.

IV. THERE IS NO EVIDENCE OF A PRACTICE OF IMPROPER SALARY DEDUCTIONS BASED ON QUANTITY OR QUALITY OF WORK.

Despite their best efforts to characterize the deposition and trial testimony on the issue of disciplinary suspensions, the two hundred and eighty-nine (289) Petitioners failed to put forth one instance, over the period from 1979 through the time of trial in late 1993, whereby a Sergeant or Lieutenant suffered a reduction in salary based on the quality or quantity of work performed.[8] Instead, Petitioners argue that the evidence

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[8] At page 41 of Petitioners' Brief, in subparagraph (e), it is represented that a "second witness testifies to actual deductions." Reference is made to page 85 of the Joint Appendix to support the statement but no such testimony can be found on that page. On page 86, the testifying witness made a hearsay statement that he knew of Sergeants who have been disciplined and suspended. The witness neither identified any such Sergeant nor testified that the suspension was for a period of less than a full week, nor testified that the suspension was for

shows "as a practical matter" they are subject to improper disciplinary suspensions because of the existence of a Disciplinary Code providing various possible penalties for violations of various Departmental rules, some of which involve significant safety issues (Pet. Br. 40-43). Respondents suggest that by application of their own standard, the argument fails for lack of evidentiary support. For something to be established as a "practical matter," it must, by definition, be something that is shown to be a matter of practice, not theory. That is the essence of Respondents' position, and that of the Eighth Circuit, on this point. There was no evidence of a practice of suspending Sergeants and Lieutenants without pay for periods of less than a week for non-safety related rule violations.

In fact, the two hundred eighty-nine (289) Petitioners did not produce one witness at trial who could testify that Respondents had ever initiated a proceeding to suspend any commissioned officer at the rank of Sergeant or above for a period of less than a full week as a means of discipline for any alleged deficiency in the quantity or quality of work, whether or not a violation of the Code contained in the Department Manual. It is, therefore, entirely inaccurate and erroneous to suggest that "as a practical matter" Petitioners were subject to purportedly improper disciplinary suspensions which destroyed their status as salaried employees when no such "practice"

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violation of a non-safety related Departmental rule, let alone because of variations in quality or quantity of work. The hearsay testimony cannot even remotely be construed as evidence of an actual improper salary reduction or a practice of subjecting Petitioners to improper salary reductions in contravention of 29 CFR § 541.118(a).

could be demonstrated. The complete lack of evidence of any "practice" inconsistent with the Secretary's basic concept of payment on a salary basis, regardless of any Departmental policy, is fatal to Petitioners' argument. When all rhetoric is stripped away, the facts of record show that Petitioners' legal position is one of form over substance which would lead to an absurd result.

V. THE TWO DAY SUSPENSION OF ONE PETITIONER WAS AN ISOLATED, UNIQUE INCIDENT WHICH COULD NOT REOCCUR AND IS THE ONLY EVIDENCE OF RECORD OF AN ACTUAL SALARY DEDUCTION.

Nowhere is this lack of substance more evident than in the claim that "a representative/similarly situated witness was actually docked." (Pet. Br. 41, subparagraph (d)). The witness referred to is Sergeant Michael Guzy who was charged with violating the Department's rule requiring officers to reside within the City of St. Louis. He faced discharge in 1990 as a result. Rather than proceed to a hearing and risk the loss of his job, Sergeant Guzy struck a deal by which he agreed to accept a two (2) day suspension without pay (Pet. App. 10a). Had Respondents proceeded to discharge Sergeant Guzy as originally intended, the record would be devoid of any evidence of a disciplinary suspension for less than a week of any Petitioner or other Sergeant or higher ranking officer. Given this set of facts, the suggestion that Sergeant Guzy is in any way representative of the other two hundred eighty-eight (288) Petitioners is totally misleading and untrue.

The evidence shows this was an extraordinary and isolated incident which could not reoccur after 1991 because the Disciplinary Code was changed to provide discharge as the only possible penalty to be imposed for violation of the residency rule (Pet. App. 10a). The Eighth Circuit specifically found that Sergeant Guzy's disciplinary loss of pay occurred under "unique circumstances" and the record cannot support any other conclusion. It must also be noted that these unique circumstances did not involve a reduction in salary based on a variation in either "the quality or quantity of the work performed" by Guzy. The disciplinary action had absolutely nothing to do with the amount of time spent on the job or the manner in which Sergeant Guzy did his job, although the residency rule is obviously job related. Thus, even though the Eighth Circuit treated the two (2) day suspension as "arguably" requiring Guzy to be treated as a non-salaried employee, it can be rationally argued that it did not, given the Secretary's interpretation of the salary basis of payment.

In any event, it can certainly be persuasively argued that it is non-sensical to allow a Sergeant to strike a bargain to save his job and then use his agreement to that bargain to claim that he and all other Sergeants in the Department have not been paid on a salary basis since 1986 and are owed a windfall of millions of dollars in overtime compensation.[9] The Guzy incident is not

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[9] Even if such a claim made sense as of the time the suspension occurred, the change in the disciplinary code in 1991 to eliminate the possibility of such a suspension foreclosed any future reliance on the Guzy incident as evidence that he or others were "subject to" improper reductions in salary.

evidence of a practice by which Respondents utilized the Disciplinary Code to subject Sergeants or higher ranking officers to salary reductions for violating work rules which did not involve safety issues of significance. The record is devoid of evidence of actual deductions resulting from disciplinary suspensions initiated by Respondents for any reason. Therefore, the record will not support the conclusion urged by Petitioners that they were subject to impermissible disciplinary suspensions, "as a practical matter."

VI. PETITIONERS' POSITION IGNORES ACTUAL PRACTICE AND DIRECTLY CONTRADICTS THE ARGUMENT MADE IN THEIR PETITION CONCERNING THE SECRETARY OF LABOR'S INTERPRETATION OF THE SALARY BASIS TEST.

The core issue presented by this case for decision is whether or not the mere potential for salary reduction as a disciplinary measure destroys exempt status under 29 CFR § 541.1 and 2. Petitioners' bottom line argument is found on page 42 of their Brief in which it is claimed that as long as the employee's compensation is subject to deductions, the salary test is defeated. The Eighth Circuit rejected their claim and held:

> [T]he mere possibility of an improper deduction in pay does not defeat an employee's salaried status.

(Pet. App. 8a). In other words, the Eighth Circuit panel, relying on their prior decision in *McDonnell v. City of Omaha, Nebraska, supra*, refused to ignore what had actually occurred "in practice," or, more particularly, what

had not occurred, in determining whether Petitioners were paid on a salary basis.

Despite appellate decisions to the contrary, the Secretary of Labor has now gone on record in support of the Eighth Circuit's holding on this issue. In the Brief for the United States as Amicus Curiae on the Petition for Writ of Certiorari, filed at the invitation of this Court, the Secretary's views were expressed as follows:

> [A]n employee who is otherwise paid on a salaried basis does not lose that status simply because he is *theoretically* 'subject to' an unpaid suspension of less than one week for violating a rule that is not a major-safety rule. *Rather*, salaried status is lost under the regulations only when employees are 'subject to' such a disciplinary suspension *as a practical matter*. Thus, where no deductions have actually been made, or where there have been only isolated instances in which disciplinary suspensions have occurred, or where suspensions have occurred only under unusual circumstances, employees who are not themselves suspended do not lose their salaried status. Among the factors relevant to determining whether the exemption is lost for employees who are covered by the terms of a manual that on its face permits disciplinary suspensions of less than one week, but who have not been so suspended, are: the number and type of employees covered by the policy, the number of instances of impermissible deductions, and the circumstances surrounding those deductions, *e.g.*, whether they were idiosyncratic or reflected a more routine use of suspensions of less than one week.
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> * * *
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> Under the Secretary's reading of the regulations, the court of appeals correctly concluded that petitioners as a class were not subject to reduction in pay for disciplinary suspensions of less than one week for violations of rules that are not major-safety rules. While respondents' manual permits such suspensions for sergeants, only one such suspension has occurred since 1978, Br. in Opp. 13, and that suspension occurred under "unique circumstances." Pet. App. 10a. In those circumstances, it would ignore the realities of respondents' compensation scheme to characterize petitioners as hourly-paid, rather than salaried, employees.

(U.S. Amicus Br., pp. 9-11).

A. The Secretary Of Labor's Concurrence With The Eighth Circuit's Application Of 29 CFR § 541.118(a)(5) To The Facts Of This Case Precludes Any Argument By Petitioners To The Contrary.

In their Petition for Writ of Certiorari, filed prior to the Amicus Brief of the United States, Petitioners stated that the Secretary of Labor's reasonable construction of his own rules on disciplinary docking "is due deference and is controlling even if the Circuit Court's own construction were equally reasonable," citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1983) (Pet., pp. 16-17). They further stated that due deference "to the agency responsible for FLSA enforcement requires that the Eighth Circuit's theory does not replace DOL's interpretation of its own rules." (Pet. at p. 17). Petitioners

claimed that the Eighth Circuit's application of the disciplinary deduction "rule" was at odds with the Secretary of Labor's interpretation of his own regulations (Pet., pp. 7-8). Thus, there can be no doubt as to Petitioners' unconditional endorsement of the wisdom and weight to be afforded the Secretary of Labor's interpretations of the salary basis test. Petitioners' position is that those interpretations are not simply persuasive, they should be controlling.[10] Therefore, having received the benefit of the Secretary's views on the application of the disciplinary deduction "rule" in the Amicus Brief, which turned out to be in full accord with the Eighth Circuit decision, Petitioners must now dismiss their appeal. The Secretary's view explicitly stated at page 8 of the Amicus Brief is that the Eighth Circuit "correctly concluded that petitioners were salaried employees within the meaning of the Secretary's regulations."

Amazingly, rather than acknowledge and defer to the Secretary of Labor's "clear statement" on the "correct reading of its regulations," which they say is controlling, Petitioners suggest that the Secretary, despite his wisdom and years of experience in FLSA litigation matters, just did not understand the facts in this case (Pet. Br. at pp. 37-38, footnote 31). Petitioners then proceed to simply ignore the Secretary's statement of position, which was

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[10] Numerous references are contained in Petitioners' Brief to various actions and expressions of the Secretary of Labor's position on FLSA exemption issues pertaining to public employees as being persuasive (*See* footnotes 1-4, 11, 13, 17, 18, 30, 34 and pp. 28-34).

articulated for the very purpose of eliminating any further uncertainty on the salary basis test. Inexplicably, they have attached a compilation of previous position statements by the Secretary in briefs filed in this Court and various courts of appeals (Appendix B, pp. 3a-13a). Respondents submit that Petitioners' reliance on statements by the Secretary in prior cases, in the face of a clear statement of position and application of interpretations of the salary basis test specific to this case, defies logic, not to mention common sense (U.S. Amicus Br., pp. 14-15).

The Secretary has reviewed the facts of this case as found by the trial court and determined that Petitioners were correctly held to be salaried employees within the meaning of DOL's interpretations of the salary basis test.[11] Petitioners have represented to this Court that it must defer to the Secretary in such matters of interpretation. They cannot make any credible argument that their views should prevail over those of the Secretary because

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[11] Petitioners indicate that the Solicitor General's misunderstanding of the facts of the case can be attributed to a lack of access to the record or the Joint Appendix (Pet. Br., p. 38, fn. 31). Respondents suggest that the Solicitor General and the Secretary of Labor possessed sufficient intelligence and legal acumen to review and comprehend the decisions and opinions of the trial court and the Court of Appeals, as well as the briefs filed by the parties, from which the facts of the case could be gleaned. In any event, there could have been no misunderstanding about the fact that there was only one instance of a disciplinary suspension without pay because Petitioners cannot cite record evidence of any other such instance.

the Secretary has now interpreted the salary basis test in a manner that defeats their claims.[12]

VII. THE SUSPENSION OF SERGEANT GUZY DID NOT JEOPARDIZE THE SALARIED STATUS OF ANY OTHER PETITIONER AND RESPONDENTS ARE ENTITLED TO CORRECT THE EFFECTS OF THE SUSPENSION, IF DETERMINED TO BE INCONSISTENT WITH THE SALARY BASIS OF PAYMENT.

The Eighth Circuit held that even if the two (2) day suspension agreed to by Sergeant Guzy constituted an improper deduction, which thereby converted him to a non-salaried and, therefore, a non-exempt employee, it did not have the same effect on all other Sergeants (Pet. App. 9a-10a). The Secretary of Labor has agreed, stating:

> Because the employees other than the Sergeant were not subject to disciplinary deductions in the first place, they would retain their status as salaried employees, regardless of whether respondents exercise their option to retroactively restore the salaried status of the sergeant who was suspended.

(U.S. Amicus Br., p. 16, fn. 7).

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[12] Respondents do not agree with Petitioners to the extent that they previously believed the Secretary's interpretations of FLSA regulations were controlling. However, as this Court held more than fifty (50) years ago, the rulings, interpretations and opinions of the agency charged with FLSA enforcement constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The Secretary's interpretation of the effect of making an impermissible salary deduction is expressed in 29 CFR § 541.118(a)(6). In the first place, the Secretary indicates that the result will necessarily depend on the facts of the particular case. However, it is further stated that:

> where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The one-time reduction in Sergeant Guzy's salary resulting from his suspension was not an oversight or an unintentional occurrence. Thus, it was not inadvertent. However, Guzy was not disciplined and did not suffer a loss of pay based on either the quality or quantity of his work. It had nothing to do with a lack of work. As the Eighth Circuit noted in footnote 7 of the panel's opinion:

> Because the regulation is written in the disjunctive, it is not material that the deduction from Sergeant Guzy's pay was not inadvertent, as long as it was made for reasons other than lack of work. *Lee v. Flightsafety Servs. Corp.*, 20 F.3d 428, 433 (11th Cir. 1994).

(Pet. App., pp. 9a-10a).

Petitioners suggest that for an employer to avail itself of the opportunity to correct the effects of an improper deduction, the deduction must have resulted from inadvertence *and* reasons other than lack of work. Such a reading is contrary to the plain wording of the Secretary's interpretation. As Petitioners point out, the Secretary's interpretations of the salary basis test have remained

unchanged since 1954 (Pet. Br., pp. 3-4, fn. 2). Presumably, if the interpretation on the reasons for an impermissible deduction in 29 CFR § 541.118(a)(6) was erroneously stated in the disjunctive, the Secretary would have corrected the error sometime in the last forty (40) years. Under the circumstances, the Eighth Circuit's decision applying the Secretary's interpretation as written is reasonable and rational and should not be disturbed.

There is no "accepted rule" to the contrary, as Petitioners suggest at page 44 of their Brief. In the only two (2) cases relied upon by Petitioners for the "rule," there were express policies and there was evidence of an existing practice of making salary deductions, by suspension and withholding pay, due, at least in part, to variations in quality or quantity of work. *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991).[13] Neither factor is present in this case. Two hundred eighty-eight (288) of the two hundred eighty-nine (289) Petitioners have never been shown to have been subjected to a single deduction from their salaries as a disciplinary

[13] It should not go unnoticed that the *Malcolm Pirnie* case, *supra*, is the only case cited by Petitioners involving the issue of being "subject to" deductions from salary that was filed by the Secretary of Labor. It has become clear that it is private litigants who are pursuing cases such as this in hopes of obtaining windfall recoveries, whereas the agency charged with enforcement of the FLSA, to which deference is owed, has declined to assert or support the extreme legal positions urged by those litigants. More particularly, in the Amicus Brief, the Secretary has specifically advised this Court that there is no conflict between the *Malcolm Pirnie* decision and the Eighth Circuit decision in this case.

measure or because of deficiencies in the quantity or quality of their work. The circumstances of Sergeant Guzy's suspension are unique. Because of a specific change in the Disciplinary Code in 1991, neither Sergeant Guzy nor any other commissioned officer of the Department has since been subject to a suspension of less than a week for violation of the residency policy (Pet. App. 148a, Manual Reference 8.005).

Yet, Petitioners seemingly still claim that this one isolated incident which could not recur, in and of itself, was sufficient to prove that Sergeants and Lieutenants were never paid on a salary basis and should collect overtime compensation back to 1986 (Pet. Br., p. 44). In other words, all Petitioners would recover back pay for four (4) years before the Guzy suspension occurred and for the period from 1991 to the present even though the possibility of any officer being subjected to a suspension under similar circumstances has not existed since then. Nothing better demonstrates the extremity and absurdity of Petitioners' legal position in this case.[14] Petitioners have ignored the Secretary of Labor's express disagreement with their position on this issue.

Respondents submit that 29 CFR § 541.118(a)(6) is an explicit recognition that a situation can arise whereby an employer could take some action which results in a

[14] If successful for Sergeants and Lieutenants, there is no reason to believe that the same arguments will not be made to obtain overtime pay for Captains, Majors, Colonels, and even the Chief of Police, with the result being that no commissioned officer is exempt regardless of his/her duties or disciplinary experience since 1986.

deduction from an employee's salary even though it is neither intended nor expected that the action would change his/her salaried status. The Secretary has long recognized that subjecting the employer to liability for two (2) years of overtime pay just because of such an occurrence would be unfair and inequitable. Therefore, the employer is entitled to an opportunity to correct the situation, if the deduction was one that was inconsistent with the salary basis of payment, and assure that it will not reoccur. If any case fits the criteria for allowing a correction without loss of salaried status for a particular employee or employees similarly situated, it is this one.

It would be a travesty of justice to award Sergeant Guzy, not to mention two hundred eighty-eight (288) other Petitioners, years of overtime pay as if he, and the others, had been hourly paid employees, solely because Guzy negotiated and agreed to a deal that kept him from losing his job. Yet, that is what this case comes down to if the disciplinary component of the salary test is applicable to Respondents and interpreted as Petitioners suggest. Had Sergeant Guzy been discharged as originally proposed, he would have remained a salaried, exempt employee through the date of his discharge. For Guzy and the other Petitioners to now claim that because he was not fired, neither Guzy nor any of the Petitioners were ever paid on a salary basis, is patently absurd.

If the suspension is finally judged to have been an impermissible deduction which jeopardized Sergeant Guzy's salaried status, Respondents are committed to reimbursing him for the two (2) days pay. Further modifications to the Disciplinary Code in the Police Manual to reflect that commissioned officers at the rank of Sergeant

or above will not be assessed disciplinary suspensions for periods of less than a full week for non-safety related rule violations are not deemed necessary if the Eighth Circuit opinion is affirmed without modification. Respondents are willing to commit to continue their existing practice should this Court determine that the conditions of 29 CFR § 541.118(a)(5) and (6) are applicable and necessary to preserve Sergeant Guzy's salaried status. The record is devoid of evidence that any other Petitioner ever suffered the loss of even one (1) hour of pay under the existing practice, due to an impermissible deduction.

Petitioners complain that if the Eighth Circuit's ruling on this issue is affirmed, employers will deliberately initiate policies to make improper deductions from salaried employees' compensation and avoid liability if and when sued, by simply reimbursing the employees and reforming any offending portion of the policy. Of course, Petitioners have no factual basis for their cynical speculation and the premise is fundamentally flawed. The Eighth Circuit specifically held that the "window of correction" is not available to an employer who has "a settled policy of making improper deductions from compensation," citing the *Malcolm Pirnie* case, *supra* (Pet. App. 10a). Therefore, the threatened demise of the salary basis test theorized by Petitioners could not occur, as a practical matter. An employer making repeated improper deductions will, by doing so, demonstrate that in practice, employees are not paid on a salary basis.

There is no evidence in this case of any settled policy or practice of making improper deductions from the salaries of executive and administrative employees.

CONCLUSION

Under the principles of law announced in *Seminole Tribe of Florida v. Florida, supra,* Petitioners' cause of action should be dismissed for lack of jurisdiction. In the alternative, this Court should rule that the FLSA salary basis test, at least insofar as the disciplinary deduction component in 29 CFR § 541.118(a)(5) has been interpreted to apply, is irrational, arbitrary and capricious and, therefore, invalid as applied to Respondents.

Should the Court find the salary test, as interpreted by the Secretary of Labor, to be properly applied, based on the facts of this case, the Eighth Circuit decision should be affirmed.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRANCIS BERNARD AUER, et al.	**Case No. 88-2071-C-4**
PLAINTIFFS,	
v.	
DAVID A. ROBBINS, et al.,	
DEFENDANTS.	

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, OVERTIME PAY, LIQUIDATED DAMAGES AND OTHER RELIEF UNDER THE FAIR LABOR STANDARDS ACT

I. INTRODUCTION

1. Plaintiffs bring this action on behalf of themselves and other employees similarly situated for a declaratory judgment that the defendants have willfully and wrongfully violated their statutory obligations, and to recover back wages and liquidated damages in equal parts from the defendants for violations of the Fair Labor Standards Act (FLSA) of 1938, as amended, 29 U.S.C. Section 201, et seq.

Defendants' violations include: the institution and operation of a compensatory time system after April 15, 1986; unilateral adjustment in the administrative regulations and application of rules controlling plaintiff's

wages or fringe benefits; a failure to keep proper records as required by the FLSA; the treatment of non-exempt employees as exempt from the FLSA on the basis of rank, position or salary alone rather than through analysis of the duties and responsibilities actually performed by the employee; and improper calculations for FLSA overtime entitlement.

II. JURISDICTION

2. Jurisdiction of this action is conferred on this Court by 29 U.S.C. Section 216(b), and 28 U.S.C. Sections 1331, 1337. Declaratory relief is authorized under 28 U.S.C. Sections 2201, 2202.

3. Venue for this action lies in this Court pursuant to 28 U.S.C. Section 1391(b).

III. PARTIES

4. Plaintiff, Francis Bernard Auer, is an adult resident citizen of the City of St. Louis, employed as a law enforcement officer by the Metropolitan Police Department of the City of St. Louis, state of Missouri. Plaintiff was commissioned as a Sergeant as of December 14, 1970. Incorporated by reference is Plaintiff Auer's consent to this lawsuit, previously filed with the Court.

5. Plaintiff, Christopher James Day, is an adult resident citizen of the City of St. Louis, employed as a law enforcement officer by the Metropolitan Police Department of the City of St. Louis, state of Missouri. Plaintiff was commissioned as a Sergeant as of January 1984.

Incorporated by reference is Plaintiff Day's consent to this lawsuit. previously filed with the Court.

6. Plaintiff, James Gilbert Hall, is an adult resident citizen of the City of St. Louis, employed as a law enforcement officer by the Metropolitan Police Department of the City of St. Louis, state of Missouri. Plaintiff was commissioned as a Sergeant as of January 1984. Incorporated by reference is Plaintiff Hall's consent to this lawsuit, previously filed with the Court.

7. Plaintiffs Francis B. Carona, Anthony Pona, Michael A. Indelicato, Richard Buehler, Joseph D. Beffa, Eugene Milne, George McDonagh, Herman Ubben, James E. Long, Roy Bugdorf and Donald Swanson are sergeants employed by the St. Louis Metropolitan Police Department. Incorporated by reference are the aforementioned plaintiffs' consents to this lawsuit, previously filed with this Court.

8. Defendant David A. Robbins is a member of the City of St. Louis Board of Police Commissioners, and its acting President.

9. Defendant Rita M. Krapf is a member of the City of St. Louis Board of Police Commissioners.

10. Defendant James F. Conway is a member of the City of St. Louis Board of Police Commissioners.

11. Defendant Charles E. Misceaux is a member of the City of St. Louis Board of Police Commissioners.

12. Defendant Freeman Bosely, Jr. is a member of the City of St. Louis Board of Police commissioners.

13. The Board of Police Commissioners was created under the authority of RsMO Section 84.020 and is the governing state agency authority for the St. Louis Police Department. Said Board is an employer within the meaning of 29 U.S.C. Section 203(d).

14. The defendants and their officers and agents have violated, and continue to violate, the provisions of the FLSA by failing and refusing in a willful and intentional manner since April, 1986 to pay plaintiffs' wages due them under the FLSA and its implementing regulations. Defendants have further failed to keep records required by the FLSA, and have attempted to exempt from FLSA coverage non-exempt employees.

15. The Fair Labor Standards Act was amended in 1974 to cover virtually all state and local government activities. Those amendments were challenged as unconstitutional, and in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the United States Supreme Court held them to be unconstitutional. On February 19, 1985, the Supreme Court reversed itself, and in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), held that the FLSA applies to all state and local government employees. That decision had the immediate impact of rendering illegal many of the standing wage and hour policies of defendant Board of Police Commissioners, including its use of compensatory time, its calculation of overtime entitlement, its record keeping, and its exemption from overtime of employees on the basis of rank and/or salary.

16. On November 13, 1985, the Fair Labor Standards Amendments of 1985 (Pub. Law 99-150) were enacted.

The amendments responded to many concerns raised in police administration by including special provisions in the FLSA which apply only to state and local employees.

17. Neither prior to nor during April 1, 1986, did the defendants Board of Police Commissioners take the necessary steps to comply with the new amendments before their effective date of April 15, 1986.

18. It is currently the policy of the Board of Police Commissioners to pay additional compensation for all hours of service rendered by Turnkeys, Probationary Patrolmen and Patrolmen in excess of the established regular working period. The rate of compensation is one and one half times the regular hourly rate. Further, no officer above the rank of Sergeant receives overtime compensation. The aforementioned overtime provisions are governed by RsMO Section 84.160.

19. RsMO Section 84.160(5) is unconstitutional in that it violates Article 6, clause 2 of the United States Constitution wherein the U.S. Constitution and the Laws of the United States shall be the Supreme Law of the land. More particularly, the State cannot enact a law exempting Sergeants from overtime compensation contrary to the provisions of the FLSA.

20. At no time prior to or since April 1986, has the Board instituted a time and attendance record keeping system designing to record all work time within the meaning of FLSA.

IV. CAUSE OF ACTION

21. The foregoing conduct of the defendants is in violation of the rights of plaintiffs under the Fair labor Standards Act of 1938 as amended.

V. RELIEF

WHEREFORE, plaintiffs pray that this Court:

A. Order defendants, under the supervision of plaintiffs' counsel, to make a complete and accurate accounting of all the overtime compensation due plaintiffs;

B. Enter a declaratory judgment declaring that the defendants have willfully and wrongfully violated their statutory obligations and deprived the plaintiffs of their entitlement under the law, as alleged herein;

C. Enter a judgment under Section 216 of the FLSA against defendants for all sums found due to plaintiffs in overtime compensation;

D. Award plaintiffs' monetary damages in the form of overtime compensation and liquidated damages equal to their unpaid overtime compensation plus interest;

E. Award plaintiffs' their reasonable attorney's fees to be paid by defendants, and the costs and disbursements for this action;

F. Declare RsMO Section 84.160 unconstitutional; and

G. Grant such other relief as may be just and proper.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: April 29, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of April, 1993 the foregoing Second Amended Complaint for Declaratory Judgment, Overtime Pay, Liquidated Damages and Other Relief Under The Fair Labor Standards Act was sent Federal Express to:

John B. Renick, Esquire
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Suite 200
St Louis, Missouri

/s/ Michael T. Leibig
Michael T. Leibig